IN THE MATTER OF THE ARBITRATION BETWEEN

UNITED STEELWORKERS OF AMERICA, LOCAL 717, Union, and SMEAD MANUFACTURING COMPANY, Employer.	)	FEDERAL MEDIATION AND CONCILIATION SERVICE CASE NO. 07-53179 DECISION AND AWARD OF ARBITRATOR

APPEARANCES

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On April 10, 2007, in Hastings, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by discharging the grievant, Marion Goetsch. Post-hearing briefs were received by the arbitrator on May 27, 2007.

FACTS

The Employer manufactures file folders and other office products used for the organization of written documents -- at several facilities, including one at Hastings, Minnesota. The Union is the collective bargaining representative of most of the non-supervisory employees of the Employer who work in production and maintenance at the Hastings plant.

The grievant was hired by the Employer on July 9, 1979. On December 15, 2006, Roger A. Finstad, Human Resources Manager, sent her the following letter, discharging her:

> This letter is a follow-up to my telephone call to you December 14, 2006. In that conversation you were informed your employment with The Smead Manufacturing Company was terminated effective December 14, 2006 for the intentional destruction of Company property.

At the time of her discharge, the grievant worked in the classification, Grade B Packer, on the first shift, from 7:00 a.m. to 3:00 p.m.

Linda L. Spear, the grievant's last supervisor, testified that during the months when the events occurred that led to the grievant's discharge, November and December of 2006, she supervised thirteen employees, including the grievant, in the "Reinforced Top Tab" Area of Production (the "RTT Area"). These thirteen employees worked in three "cells." Seven of them worked in the "Auto K Collator" cell, operating a machine that installs fasteners on file folders, three of them worked in the "3-up" cell, producing file folders three at a time, and three of them worked in the "Single Lane," producing file folders one at a time. The Employer operates the RTT Area on two other

shifts -- the second shift, from 3:00 p.m to 11:00 p.m., and the third shift, from 11:00 p.m to 7:00 a.m. Usually, the employees who work in the RTT Area on the second and third shifts have less experience than those who work on the first shift.

The measurements and other specifications of file folders produced in the RTT Area vary. Because they vary, the settings for the Auto K Collator must be changed as production is transitioned from one kind of file folder to another. Employees who work on the Auto K Collator have used a notebook to record information about the settings for the machine that are appropriate to the variety of file folders produced on the machine. (Hereafter, I may refer to this notebook as the "Collating Notebook" or simply as the "Notebook.") Information about the proper settings for the Auto K Collator is also contained in a reference manual that is available near the RTT Area.

It appears from the evidence 1) that the information in the Notebook is more easily accessable than is similar information in the reference manual, 2) that the Notebook has been compiled by the employees operating the Auto K Collator over several years and 3) that the Notebook included special information not in the reference manual about "tweaks" needed for particular settings.

Spear also testified as follows. On November 13, 2006, Sandy Iverson, who is Recording Secretary for the Union and who works in the RTT Area on rotating shifts, reported to Spear that the Collating Notebook was missing and that employees on the

second shift needed it to help them with set-ups. Spear told Iverson that if the Notebook did not reappear by November 17, 2006, she would inform Finstad that it was missing. The Notebook was not recovered by November 17, 2006, and on that day, Spear informed Finstad that it was missing. Spear testified that the Notebook is needed by the less experienced employees on the second and third shifts, but not by those on the first shift, who have sufficient experience to change settings without the Notebook.

In the grievant's testimony, which I summarize as follows, she described what happened to the Notebook. On November 1, 2006, she and the other six first-shift employees who work in the Auto K Collator cell met with Spear in a regular bi-weekly cell meeting. Four of the seven employees in the cell, including the grievant, are Class B employees who rotate among several tasks needed to run the Auto K Collator. The other three employees in the cell are higher ranking Class D employees who operate the machine. Spear told the group that all of the Class D employees were to learn the tasks performed by the Class B employees so that, if the machine "went down," the Class D employees could perform any of the tasks done in the cell.*

After the meeting, which lasted about forty-five minutes, the employees went back to their work. The grievant testified

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* Since 2002, the Employer has been gradually installing a its "Lean Initiative" project, which includes cross-training of employees to permit flexible operation of the plant.

that she and the other Class B employees were very upset; they were concerned that, if the Class D employees learned to do the tasks of the Class B employees, the result could be that the Class B employees would be "sent home." According to the grievant, the four Class B employees decided that they "should not leave" the Collating Notebook in the RTT Area. The plan was that someone would take the Notebook home, keeping it away from the RTT Area, but that, "if anyone needed it," it would still be available. The grievant testified that the Notebook contained set-up shortcuts written by the first-shift employees over several years, but that the proper set-ups could be determined by using samples kept in the area; she was not aware that similar information was included in reference manuals. The Class B employees knew, however, that obtaining the information from the samples would take "longer." The grievant testified that the Class B employees thought that "if the Company asked for the Notebook, they "would have put it back."

On November 2, 2006, Spear heard that "the Collators were mad" and reprimanded them for discussing "what went on," telling them not to discuss the matter. According to the grievant, for the rest of that day "people were even more upset" and the Class B employees decided to move the Notebook to the home of one of the other Class B employees. On Friday, November 3, 2006, the discussions among the Class B employees continued, and the grievant took the Notebook home for the weekend.

She testified that that weekend she threw the Notebook into the trash at her home, deciding to do so because "it had

become a big thing" and she "wanted it over with." She did not think that throwing it away would affect anyone's job.

The grievant testified that on Monday, November 13, 2006, Iverson came to the cell and told the group that someone had reported that the Notebook was missing. Iverson said that someone on the second shift who needed the Notebook had complained that it was gone. No one told Iverson what had happened to the Notebook. The grievant testified that on November 15, 2006, Spear told the Class B employees in the cell that if the Notebook did not reappear, they would all be "written up" and that on November 17, 2006, Spear told them that, if the Notebook was not recovered by noon that day, they would be written up.

The grievant testified that a new Collating Notebook was started on November 13, 2006, by the four Class B employees in the cell and that they told Spear they were rewriting it. The grievant testified that the new Notebook was "pretty much complete" by November 27, 2006, and that it was better than the old Notebook because it did not have the obsolete information contained in the old one.

On December 7, 2006, Finstad interviewed the grievant and the other six first-shift employees in the Auto K Collator cell. He interviewed them one at a time, but all interviews were in the presence of Spear, Iverson and Julie Conroy, President of the Union. He interviewed three of the employees a second time on that day. Below are set out, verbatim, the notes Finstad took during his first interviews that day:

Marilyn Rud:

- Knew it was missing week of the 13th
- Does not know what happened to it
- Asked others to give it to her and she would return it and if she was fired it would be ok as she has less to lose
- Was a benefit. Why? Because of the 3rd shift running Collator

Pam Fox:

- Said she knows who took it
- Doesn't know if it is intact
- Taken because of Class 8 on midnights
- Who took it? Jerilu and Jackie and maybe Karen
- Karen had it (a week?) and then gave it to Marilyn Rud
- Did Karen tell you she had it? Karen said to give it to Marilyn because she has the most seniority
- Pam believes everyone knows, she was shocked she done it
- She used the book in the beginning
- Pam is prepared to sign a statement the information she has given is true
- Pam saw Karen give the book to Marilyn
- Second shift was looking for it, Gloria called Marilyn (sisters) asking where the book was.

Jeannie Bignell:

- Don't remember
- Knows who did it by what employees have told her but did not see who did it
- Not willing to tell names - hearsay from department
- Don't want to tell who told her
- Can't tell has to follow her heart

Marion Goetsch:

- Knew it was missing the week of the 13th
- Doesn't know anything
- Has heard conversations
- Maybe was thrown away during the cleaning for 100th anniversary. May have been inadvertently picked up.

Jerilu Brenner:

- Found out about it on Monday 13th? 20th?
- On the 10th someone was looking for it heard about it on Monday
- Doesn't know what happened to it
- Doesn't know who took it
- She didn't take it hasn't seen it, no talk, no names
- No one has admitted to it

Karen Gunter:

- Found out the book was missing when Sandy Iverson asked about it
- Denies knowing anything about the book

Jackie Snider:

- No idea how it disappeared
- Marion told Pam Fox it was missing
- Doesn't know what happened to it
- Doesn't know who took it
- She didn't take it hasn't seen it, no talk, no names
- No one has admitted to it

The grievant testified that she had lied to Finstad during the interview on December 7 and that she "felt terrible." She testified that she had lied at first about what she had done because she feared that everyone in the cell would be disciplined by Finstad, as he had threatened to do.

The grievant telephoned a Union steward the evening of December 7 and told her that she had thrown the Notebook away. She testified that she did not want other employees to take the blame for what she had done and that she decided to confess. On the morning of December 8, she went to Finstad and told him she had thrown the Notebook away and why she had done so. Finstad suspended her pending possible discipline, and she went home.

The grievant testified that she did not know the Notebook was the property of the Employer and that she would not have destroyed it if she had known that it was. She testified that, because it had been compiled over time by the employees of the cell to provide shortcuts to the settings, she thought it belonged to the employees. She also testified that if she were to be reinstated to her employment, she would not destroy the new Notebook -- testimony that I interpret as a more general statement that she would not destroy any property of the Employer.

Section 22.01 of the parties' labor agreement provides that the "Company shall not discharge any employee without just cause."

Relevant provisions from the Employer's Guide to Conduct are set out below:

> The following types of misconduct endanger good working relationships and cannot be tolerated. Violations of this type can result in disciplinary action up to and including discharge. . .
>
> Deliberate damage to or unauthorized removal of Company property or that of other employees.
>
> Deliberate limiting or hindering of production.

In addition, on February 25, 2004, the Employer distributed to all employees, including the grievant, a memorandum stating that certain listed kinds of behavior were "unacceptable" and "will not be tolerated," including "dishonesty in any form."

DECISION

The Employer makes the following arguments. The Notebook was a valuable guide to the less experienced employees who worked the second and third shifts in the Auto K Collator cell. As a tool used to aid production, it was clearly the property of the Employer -- contrary to the Union's argument that, because the information in the Notebook was entered by employees, it was their property and not that of the Employer.

Further, the Employer argues that the grievant's destruction of the Notebook was a serious offense, prohibited by the Guide to Conduct. The Employer urges that her reinstatement would serve as a condonation of such conduct and put the

Employer at risk of similar misconduct by her or by other employees.

The Employer cites an arbitration decision dated May 18, 1995, in which Arbitrator John J. Flagler denied a grievance brought by the Union's predecessor and refused to reinstate Frances Voss, a nine-year employee with no prior discipline, who had deleted files from two computers used in the Employer's Plastics Department. Voss deleted the files after she was informed, to her disappointment, that a job she had trained for would be done thereafter by non-union clerical personnel. The explanation she gave for her action was that she was embarrassed by the Employer's action and wanted to "punish, not hurt company by deleting files." She thought that her action would inconvenience the Employer, but not damage its property.

Arbitrator Flagler denied the grievance, and he gave the following primary reasons for his decision:

> The Union relies on the fact that the files were fairly easily retrieved to argue a "No harm, no foul" kind of defense which misses the real damage caused by the Grievant's misconduct. While arguably the Grievant's deletion of the tapes constituted sufficient grounds for her discharge, the principle damage was done by her boasting to co-workers that she had taken retaliatory action against the Company for what she considered a renege on a promise that the labeler job would be her's and would bring about an upgrade in classification.
>
> Such "in your face" defiance of proper and necessary Company rules might conceivably be partially mitigated by the extreme stress of the moment at the time of the incident back in July of 1994. At the hearing almost a year later, however, I listened in vain for some acknowledgement by the Grievant that she was flat wrong in her attempt to punish the Company for what she felt to be a broken promise, rather than pursuing a remedy through appropriate grievance procedures. . . She missed this golden opportunity by persisting in blaming

> management for this incident rather than acknowledging her own fault and promising appropriate correction of her misconduct.

The Employer argues that the decision in the Voss case supports a like decision here.

The Union makes the following arguments. The grievant testified that she thought the Notebook was a tool created by the employees to make set-ups easier and that, if she had thought it was the property of the Employer, she would not have thrown it away. The Union argues that, even if the grievant was wrong in her belief that the Notebook was not the property of the Employer, she should not have been discharged. She was employed by the Employer for twenty-seven years without any previous discipline. That long history of satisfactory employment should have been considered when determining her discipline. Further, though at first, on December 7, 2006, she denied what she had done, she came forward voluntarily the next day and informed Finstad that she was responsible for throwing the Notebook away.

In addition, the Union makes the following argument that the grievant's case should be distinguished from the Voss case. In that case, as Arbitrator Flagler pointed out, Voss' anger toward the Employer and her lack of remorse were important factors in his decision to deny the grievance. Here, the grievant testified that she was not angry with the Employer, either at the time of the incident or at the time of the hearing, that she had made a stupid mistake she regretted and that, if she were to be reinstated to her employment, no similar conduct would occur in the future.

I make the following rulings. The Notebook was the property of the Employer. Even if, as some witnesses for the Union testified, the Notebook when new was supplied by an employee, the first shift employees in the Auto K Collator cell wrote information in it that made production more efficient. Because they did so as they were working and earning wages paid by the Employer, the information in the Notebook, if not the paper on which the information was written, was the property of the Employer.

In the following discussion, I give a fair summary of "just cause" principles as defined in American labor law. The essence of the employment bargain between an employer and an employee (or a union representing an employee) is that the employer agrees to provide the employee with pay and other benefits in exchange for the agreement of the employee to provide labor in furtherance of the employer's enterprise. When the employer and the employee or, as here, a representing union, have also agreed that the employer may not terminate the employment bargain except for "just cause," they intend that discharge will not occur unless the employee fails to abide by the bargain to provide labor in a manner that furthers the enterprise.

The following two-part test of "just cause," derives from that intention:

> An employer has just cause to discharge an employee whose conduct -- either misconduct or a failure of work performance -- has a significant adverse effect upon the enterprise of the employer, if the employer cannot change the conduct complained of by a reasonable effort to train or correct with lesser discipline.

Under this two-part test, an employer must establish 1) that the conduct complained of has a serious adverse effect on the employer's operations and 2) that the employer has attempted to prevent repetition of misconduct by training and corrective discipline, thus seeking to eliminate any future adverse effect from misconduct before taking the final step of discharge. The following examples illustrate that the facts of each case may vary the application of the test.

Some conduct may create such a threat to the enterprise that discharge should be immediate and it need not be preceded by an attempt to change the conduct, as required under the second part of the test. Such serious misconduct may be so adverse to an employer that the employer should not be required to risk its repetition. For example, an employer should not be required to use training and corrective lesser discipline in an effort to eliminate the chance of repetition for most thefts, for drug use in circumstances that threaten the safety of others or for insubordination so extreme that it undermines the employer's ability to manage its operations.

It is clear that the destruction of property used in production is significantly adverse to an employer's operations. Even if, as here, the information destroyed could be replicated, the decision to dispose of such information must be left to its owner, the Employer. The parties disagree whether the grievant's conduct was so serious that discharge and not progressive discipline was appropriate.

For the reasons below, I rule that discharge was a penalty too severe under the circumstances. The award directs the

grievant's reinstatement without back pay. The grievant expressed regret that she destroyed the Notebook, and she testified that she would not knowingly destroy property of the Employer. Though she falsely denied responsibility at first, she sought Finstad out the next day to confess that she had thrown the Notebook away. Her long history of satisfactory employment -- twenty-seven years with no previous discipline -- indicates that there is little risk that her misconduct will be repeated. As the Union argues, this case is different from the Voss case, in which Voss, a nine-year employee, expressed anger toward the Employer and no regret for deleting computer files.

The Employer argues that reinstatement of the grievant will indicate to other employees that they can engage in conduct similar to the grievant's without fear of discharge. The grievant's de facto suspension, however, for almost eight months, which will be the effect of her reinstatement without back pay, will serve to deter other employees whose records show similarly low risk of repetitive misconduct.

AWARD

The grievance is sustained. The Employer shall reinstate the grievant to her position without loss of seniority, but without back pay.

July 27, 2007

Thomas P. Gallagher, Arbitrator